

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 23, 2004

IN RE:

**APPLICATION OF TIME WARNER CABLE
INFORMATION SERVICES (TENNESSEE) LLC
D/B/A TIME WARNER CABLE (TWCIS) FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY TO PROVIDE COMPETITIVE
TELECOMMUNICATIONS SERVICES WITHIN
THE STATE OF TENNESSEE**

**DOCKET NO.
04-00176**

**INITIAL ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the “Authority” or “TRA”) at a Hearing held on October 12, 2004, to consider the *Application for Certificate of Public Convenience and Necessity to Provide Telecommunications Services within the State of Tennessee* (the “*Application*”) filed by the Time Warner Cable Information Services (Tennessee) LLC d/b/a Time Warner Cable (“TWCIS”) on June 16, 2004. The Application requests the Authority to grant a certificate of public convenience and necessity to provide internet protocol-based “local, intraLATA, and intrastate interLATA voice services on a facilities-based and/or resale basis to residential customers in Tennessee.”¹

Legal Standard for Granting Certificate of Public Convenience and Necessity

TWCIS’ *Application* was made pursuant to, and was considered in light of, the criteria for

¹ *Application*, p 4 (June 16, 2004)

granting a Certificate of Public Convenience and Necessity ("CCN") as set forth in Tenn. Code

Ann. § 65-4-201, which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

* * *

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its service area existing on June 6,

1995.²

Furthermore, pursuant to Tenn. Code Ann. § 65-5-212, a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

The October 12, 2004 Hearing

Pursuant to Tenn. Code Ann. § 65-4-204, public notice of the Hearing in this matter was issued by the Hearing Officer on October 1, 2004. No persons sought intervention prior to or during the Hearing. At the Hearing held on October 12, 2004, Charles B. Welch, Jr., Esq.; Farris, Matthews, Branan, Bobango, Hellen & Dunlap PLC, 618 Church Street, Suite 300, Nashville, Tennessee 37219 appeared on behalf of TWCIS, Ms. Julie Y. Patterson, Vice President and Chief Counsel of Telephony for TWCIS, presented testimony, and was subject to examination by the Hearing Officer. Upon the conclusion of TWCIS's presentation of proof, the Hearing Officer granted TWCIS's *Application* based upon the following findings of fact and conclusions of law:

² Notwithstanding the existence of subsection (d), the Federal Communications Commission ("FCC") has expressly preempted the Authority's enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d). *In the Matter of AVR, L P d/b/a Hyperion of Tennessee, L P Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, (Memorandum Opinion and Order) 14 F.C.C.R. 11,064 (May 27, 1999), (Memorandum Opinion and Order) 16 F.C.C.R. 1247 (January 8, 2001). The Authority has since issued an order expanding a competing local exchange carrier's CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. *See In re Application of Level 3 Communications, LLC to Expand its CCN to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in all Tennessee Service Areas*, Docket No 02-00230, *Order Approving Application of Level 3 Communications, L L C to Amend Its Certificate of Public Convenience and Necessity* (June 28, 2002).

I. TWCIS' Qualifications

1. TWCIS is a corporation organized under the laws of the State of Delaware on January 12, 2004, and was qualified to transact business in the State of Tennessee on January 26, 2004.

2. The complete street address of TWCIS's registered agent is CT Corporation, 800 South Gay Street, Suite 2021, Knoxville, Tennessee 37929-9710. The complete street address of TWCIS's corporate office is 290 Harbor Drive, Stamford, Connecticut 06902. The telephone number is (203) 328-0671 and the facsimile number is (203) 328-4840.

3. The *Application* and supporting documentary information existing in the record indicate that TWCIS has the requisite technical and managerial ability to provide competitive access services and transport telecommunications services and within the State of Tennessee. Specifically, TWCIS's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience.

4. TWCIS has the necessary capital and financial ability to provide the services it proposes to offer.

5. TWCIS has represented that it will adhere to Tenn. Code Ann. § 65-4-201 *et seq.* and all applicable policies, rules and orders of the Authority.

II. Proposed Services

TWCIS intends to provide competitive Internet Protocol-based local, intraLATA, and intrastate, interLATA voice services on a facilities-based and/or resale basis to residential customers within the State of Tennessee.

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon a review of the *Application* and the record in this matter, the Hearing Officer finds that approval of TWCIS' *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

TWCIS has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and the Authority's Rules.

V. Compliance with Tennessee's County-Wide Calling Requirements

TWCIS has indicated its awareness of, and its obligation to comply with, the requirements of county-wide calling as set forth in Tenn. Code Ann. § 65-21-114.

VI. Compliance with Tenn. Code Ann. § 65-4-124(c).

TWCIS requested in its *Application*, that it be exempted from providing Lifeline and Link-up services to qualifying citizens, as well as educational discounts in existence as of June 6, 1995. Regarding educational discounts, TWCIS stated it does not intend to provide any of its proposed services to schools and libraries. TWCIS also based its request for exemption upon the Federal Communications Commission's current considerations of whether and how the federal universal service system should apply to providers of internet protocol-based services and the uncertainty regarding the applicability of universal service obligations to providers of internet protocol-based services. The Hearing Officer finds the following provisions from the Tennessee Code Annotated and from the Authority's rules apply to the Company's request:

Tenn. Code Ann. 65-4-101(1) (2004) states:

“Competing telecommunications service provider” means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, or communications service similar to such services and is certificated as a provider of such services after June 6, 1995 unless otherwise exempted from this definition by state or federal law.

Tenn. Code Ann. 65-4-124(a) (2004) states:

All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.

Tenn. Code Ann. 65-4-124 (b) (2004) states:

The Tennessee regulatory authority shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.

Tenn. Code Ann. § 65-4-124(c) (2004) states:

These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing, provide access to 911 emergency services, provide free blocking service for 900/976 type services, provide access to telecommunications relay services, provide Lifeline and Link-up Tennessee services to qualifying citizens of the state and provide educational discounts existing on June 6, 1995.

TRA Rule 1220-4-8-.04(3)(b)(5) and (6) state:

(3) Conditions of Certification

(b) With entry into the local exchange communications markets in Tennessee comes basic obligations and responsibilities to serve the public interest. Therefore, all Competing Telecommunications Service Providers providing basic local exchange telephone service or its equivalent shall either directly or through arrangements with other carriers or companies.

* * *

- (5) Provide Lifeline and Link-up services to qualifying citizens of this state;
- (6) Provide educational discounts in existence as of June 6, 1995.

TRA Rule 1220-1-1-.05(1) states:

For good cause, including expediting the disposition of any matter, the Authority may waive the requirements or provisions of any of these rules in a particular proceeding, on motion of a party or on its own motion, except when a rule embodies a statutory requirement. The Authority shall state the basis of any such waiver and may impose conditions limitations consistent with the basis for the construction of these rules.

The Hearing Officer finds that TWCIS is a “competing telecommunications service provider” within the meaning of Tenn. Code Ann. § 65-4-101(1) (2004) because TWCIS provides “telecommunications services” which include two-way communications service and because, upon entry of this order, TWCIS will be certificated as a provider of such services after June 6, 1995.³ The Hearing Officer finds no applicable federal or state exemption from this definition.

TRA Rule 1220-4-8-.04(3)(b)(5) and (6) require competing telecommunications service providers to provide Lifeline and Link-up services to qualifying citizens of this state and to provide educational discounts in existence as of June 6, 1995.


TRA Rule 1220-1-1-.05(1), while providing that the Authority may waive the requirements of its rules in certain instances, does not permit a wavier of Authority rules that embody a statutory requirement. The Hearing Officer finds that TRA Rule 1220-4-8-.04(3)(b)(5) and (6) embody the statutory requirement found in Tenn. Code Ann. § 65-4-124(c) (2004) that mandates that the Authority promulgate rules ensuring that all telecommunications services

³ *Application*, p 4 (June 16, 2004)

providers who provide basic local exchange telephone service, or its equivalent, also provide Lifeline and Link-up services and educational discounts to qualifying citizens. The TRA has no authority to waive these statutory requirements. The Hearing Officer has found no federal statute, or order of the Federal Communications Commission, that preempts the Tennessee statute and Authority rules referenced above. Based on the foregoing analysis, TWCIS's request for an exemption must be denied.

IT IS THEREFORE ORDERED THAT:

1. The *Application for Certificate of Public Convenience and Necessity to Provide Telecommunications Services within the State of Tennessee* of Time Warner Cable Information Services (Tennessee) LLC d/b/a Time Warner Cable is approved;
2. The request for exemption from the statutory requirements to provide Lifeline and Link-up services and educational discounts as reflected on page six (6) of the *Application for Certificate of Public Convenience and Necessity to Provide Telecommunications Services within the State of Tennessee* is denied.
3. Any party aggrieved by the Hearing Officer's decision in this matter may file a petition for reconsideration with the Hearing Officer within fifteen (15) days from and after the date of this Order.


Randal Gilliam, Hearing Officer